WILMER, CUTLER & PICKERING
2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (44171) 839-4466
FACSIMILE 011 (44171) 839-3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 (322) 231-0903
FACSIMILE 011 (322) 230-4322

FRIEDRICHSTRASSE 95
BRIEFKASTEN 29
D-10117 BERLIN
TELEPHONE 011 (4930) 2022-6400
FACSIMILE 011 (4930) 2022-6500

JACQUELYNN RUFF
DIRECT LINE (202)
663-6791

September 18, 1997



BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Suite 222
Washington, D.C. 20554

Re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Docket No. 97-137

Dear Mr. Caton:

Enclosed for filing with Commission on behalf of U S WEST, Inc. are an original and four copies of a petition for reconsideration the Commission's order in the above-captioned proceeding.

If there are any questions concerning this filing, please communicate with the undersigned.

Sincerely,

Jacquelynn Ruff

Jacquelynn Ruff

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554



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| In the Matter of | ) | |
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| Application of Ameritech Michigan | ) | |
| Pursuant to Section 271 of the | ) | CC Docket No. 97-137 |
| Communications Act of 1934, as amended, | ) | |
| To Provide In-Region, InterLATA Services | ) | |
| In Michigan | ) | |

# PETITION FOR RECONSIDERATION OF U S WEST, INC.

WILLIAM T. LAKE
JOHN H. HARWOOD II
JACQUELYNN RUFF
MICHAEL A. MCKENZIE
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

ROBERT B. MCKENNA
LAURIE J. BENNETT
U S WEST, INC.
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2861

*Counsel for U S WEST, Inc.*

*Of Counsel*:
Dan L. Poole

September 18, 1997

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## SUMMARY

U S WEST, Inc. respectfully requests that the Commission reconsider and correct the following procedural and substantive flaws in its order denying Ameritech section 271 relief:

The order is procedurally defective in three respects. It improperly fails to address all the issues presented by Ameritech's application. Yet at the same time the order adopts, without required notice and opportunity for comment, binding rules on issues that it purportedly does not decide, and it holds out the possibility that future applications will be denied for reasons that it does not identify but urges others to supply.

Moreover, the order violates the statutory prohibition on extending the competitive checklist. The order does so by imposing excessive requirements concerning operations support services and trunk blocking and by adding checklist items under the guise of applying the public interest standard.

Finally, many of the Commission's substantive determinations are directly at odds with sections 251, 252, and 271 of the Telecommunications Act of 1996 as interpreted by the United States Court of Appeals for the Eighth Circuit in Iowa Utilities Board v. FCC, No. 96-3321 *et seq.* (July 18, 1997).

Before the
FEDERAL COMMUNICATIONS COMMISSION
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| In Michigan | ) | |

**PETITION FOR RECONSIDERATION OF U S WEST, INC.**

Pursuant to Section 405 of the Communications Act, 47 U.S.C. § 405, and Section 1.106(b)(1) of the Commission's Rules, 47 C.F.R. § 1.106(b)(1), U S WEST, Inc. ("U S WEST") respectfully petitions for reconsideration of the Memorandum Opinion and Order released in this proceeding on August 19, 1997, FCC 97-298 ("Order"). The Order resolves only some of the issues presented by Ameritech's section 271 application. In addressing others (which it expressly refrains from resolving), the Order effectively adopts -- without the requisite notice and opportunity for comment -- rules on the content that *any* future section 271 application by *any* Bell Operating Company ("BOC") must contain if the application is to be entertained. At the same time, the Order announces an intention by the Commission to apply *additional* requirements to future 271 applications of a kind that it does not now identify. The result is to transform the straightforward process prescribed by section 271 into an obstacle course with an ever-receding finish line. What is more, many of the substantive determinations embodied in the Order cannot be reconciled with sections 251, 252, and 271 of the Telecommunications Act of 1996 or with the decision of the U.S. Court of Appeals for the

Eighth Circuit in Iowa Utilities Board v. FCC, No. 96-3321 *et seq.* (July 18, 1997) ("Iowa Utilities Board"). The Order should be reconsidered to repair major flaws.

**Section 1.106(b)(1) Showing**

U S WEST was not a party to the earlier stages of this proceeding that resulted in the Order. Accordingly, pursuant to the requirements of section 1.106(b)(1) of the Commission's rules, U S WEST sets forth with particularity the manner in which its interests are adversely affected by that order and shows why it was not possible for it to participate in those earlier stages.

The interests of U S WEST are adversely affected by the Order because the order not only affects all BOCs, including U S WEST, but also imposes an extraordinarily high standard for obtaining Commission authorization under section 271 of the Act to provide in-region interLATA services. U S WEST is in active planning to apply for authorization to provide such services from each of the 14 states in its service territories. The Order has severely disrupted those plans by setting the bar for section 271 authorization at an apparently insuperable height, by failing to address the adequacy of Ameritech's showing on numerous checklist items, and by using other items and the "public interest" standard to expand the checklist to encompass untold future requirements.

It was not "possible" for U S WEST to participate in the earlier stages of this proceeding (see 47 C.F.R. § 1.106(b)(1)) because U S WEST could not reasonably anticipate that the Commission, on issues it explicitly said it was not resolving in the context of Ameritech's section 271 application, would adopt new substantive requirements applicable to all BOCs' future applications. Nor could U S WEST anticipate that the Commission would not only

fail to resolve many issues squarely presented, but also reserve for itself the right continually to insert new requirements.

The Commission did not provide public notice of a proposal to take this course or any opportunity to file comments, in accordance with the Administrative Procedure Act and sections 1.412 and 1.415 of its own rules. Nor was there advance notice that, in spite of the Eighth Circuit's pending stay of the Commission's pricing and pick-and-choose rules, Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996), the Commission would consider requiring BOCs to comply with those rules as conditions of granting any section 271 application. Indeed, U S WEST's expectation that the Commission would address only the specifics of Ameritech's application had been reinforced by the Commission's focused approach in its order on the earlier section 271 application of SBC Communications, Inc.[1/] In that proceeding, in which U S WEST did participate,[2/] the Commission's order addressed only the specific issues necessary to rule on the application. In short, had the Commission given notice of its intentions, U S WEST would have been able to protect its interests through participation earlier in this proceeding.[3/] Because the Commission did not provide such notice, U S WEST could not do so.

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1/ Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121 (rel. June 26, 1997).

2/ See Comments of U S WEST, Inc. (April 28, 1997).

3/ In any event, the public interest favors waiving section 1.106(b) here for the reasons set forth above. The Commission has often waived the provisions of section 1.106(b) where the petitioner raises a substantial public interest question or where the agency's actions are in need of further clarification, see, e.g., New York Telephone Co., 6 FCC Rcd 3303 (1991); Hughes Communications Galaxy, Inc., 6 FCC Rcd 6977 (1991); Louisiana Television Broadcasting Corp. 17 F.C.C.2d 973 (1969), and it should do so in this instance. Without notice to the affected parties, the Order plows new ground and presents significant legal issues.

## DISCUSSION

### I. THE ORDER IMPROPERLY FAILS TO ADDRESS THE ISSUES PRESENTED, ADOPTS BINDING RULES ON ISSUES EXPLICITLY NOT DECIDED, AND THREATENS UNLIMITED NEW SECTION 271 REQUIREMENTS IN THE NAME OF "PUBLIC INTEREST."

The Order is procedurally flawed in three respects. It improperly fails to address all of the issues presented by the Ameritech application. Yet at the same time the Order adopts, without required notice and opportunity for comment, binding rules on issues that it purportedly does not decide, and it holds out the possibility that future applications will be denied for reasons that it does not identify but urges others to supply.

#### A. The Commission Should Address Each of the Issues Presented by a Section 271 Application.

The Order improperly fails to resolve all the issues presented by Ameritech's section 271 application. Because the Commission concludes that Ameritech does not meet the competitive checklist with respect to three items, it refuses to "decide whether Ameritech has met its burden of demonstrating compliance with the remaining items on the competitive checklist." Order ¶ 5. In addition, the Order does not even make clear what Ameritech or any other applicant would have to do to satisfy the Commission's interpretation of the three checklist items that were the basis for denying Ameritech's application.[4/] These deliberate omissions violate section 271 of the 1996 Act and the Administrative Procedure Act.

Congress imposed a strict deadline on Commission review of applications under section 271. 47 U.S.C. § 271(d)(3) (90 days). The Commission has ruled that a BOC

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[4/] For example, the Order concludes that Ameritech lacks proper safeguards to ensure nondiscrimination in its provision of 911 service -- but the Order does not indicate what safeguards would be construed as sufficient. Id. ¶ 279.

application must be complete when filed; the Commission will not consider supplemental submissions by BOCs that respond to adverse comments.[5/] Therefore, if the Commission rejects a BOC's application without reaching each of the issues squarely presented, the applicant may be forced to submit successive applications for interLATA relief in a given state, each time curing only the flaws specifically identified in the preceding decision. Congress' 90-day deadline for Commission action is meaningless if the BOC has to submit sequential applications to secure a complete decision, repeatedly restarting the 90-day clock.

The Commission's approach is inconsistent with general principles of administrative law as well as section 271. Under 5 U.S.C. § 557(c)(3)(A), the Commission is required to provide "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." See also Southwestern Bell Tel. Co. v. FCC, 100 F.3d 1004, 1008 (D.C. Cir. 1996) (requiring "coherent, . . . forthright, explanation of [FCC's] actions"). Where an agency "opts not to reach . . . an issue, the agency must provide an acceptable explanation for its decision -- it cannot simply decline to resolve an issue" it (or, here, Congress) has asked the parties to present. MCI Telecomms Corp. v. FCC, 917 F.2d 30, 41 (D.C. Cir. 1990). Here, however, the Commission has provided no explanation for refusing to resolve all of the issues presented by the Ameritech application.

The Commission also cannot justify such a refusal. Limiting the issues addressed in any one decision on a particular BOC application will not conserve the Commission's administrative resources. The Commission eventually will have to address all of the issues

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[5/] See Procedures for Bell Operating Co. Applications Under New Section 271 of the Communications Act, FCC 96-469 at 2-3 (rel. Dec. 6, 1996).

because the BOC will reapply. Nor will the Commission's approach enable it to accumulate additional information in the interim. Each application depends on its own facts, which the applicant and other parties submit in the context of a particular application. In short, requiring future applicants, government agencies, and private commenters to spend hundreds of thousands of dollars and countless hours to file and argue repetitive applications will needlessly waste the resources of all concerned.

### B. The Order Violates the Administrative Procedure Act and the Commission's Rules by Adopting Binding Rules.

The Commission overreaches its authority by using the Order to promulgate what can only be characterized as substantive rules about the required contents of all future BOC section 271 applications. Since these binding rules were not preceded by notice or opportunity for comment, the Order violates both the Administrative Procedure Act ("APA")[6] and sections 1.412 and 1.415 of the Commission's own rules.[7] The rulemaking provisions of the APA were designed to ensure fairness and mature consideration of rules of general application, and they may not be avoided by an agency's attempt to create rules in the course of an adjudicatory

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[6] Section 553 of the APA requires that a general notice of proposed rule making be published in the Federal Register, and that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues covered." 5 U.S.C. § 553(b)(3). It further requires that interested persons be provided "an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation." Id. at § 553(c).

[7] Section 1.412 and 1.415 of the Commission's rules require that notice and a reasonable opportunity for comment be given before a rule is prescribed. See Arizona Grocery Co. v. Atchison Topeka & Santa Fe Railway Co., 284 U.S. 370, 389-90 (1932) (administrative agency must follow its own rules); National Cable Television Ass'n v. FCC, 747 F.2d 1503 (D.C. Cir. 1984 (FCC must follow own rules).

proceeding. See National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969).

Throughout, the Order improperly sidesteps the issues presented by Ameritech's own section 271 application and instead establishes binding obligations on "what showing is required in future [BOC] applications to demonstrate full compliance with the [271] checklist." Order ¶ 281 (emphasis added). The Order repeatedly employs specific, prescriptive, and mandatory language to articulate substantive rules clearly intended to bind administrative discretion and secure rigid compliance from all BOCs. For example, the Order sets specific requirements for interconnection pricing, stating that "a BOC cannot be deemed in compliance with [271] . . . unless [it] demonstrates that prices for interconnection . . . unbundled network elements, and transport and termination are based on forward-looking economic costs;"[8/] and that BOC prices "must be based on TELRIC principles"[9/] and must be geographically deaveraged.[10/] Similarly, incumbent LECs will be "required to provide shared transport among all end offices or tandem switches in the LECs network (i.e., between end offices, between tandems, and between tandems and end offices),"[11/] and "must provide nondiscriminatory access to unbundled local

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8/ Id. ¶ 289 (emphasis added).

9/ Id. ¶ 290 (emphasis added).

10/ Id. ¶ 292. The Order further concludes that BOCs must provide for "just and reasonable" reciprocal compensation for the transport and termination of calls. Id. ¶ 293. A BOC must demonstrate that "its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs," id. ¶ 295, and that its non-recurring charges reflect forward-looking economic costs. Id. ¶ 296.

11/ Id. ¶ 300 (internal quotation marks and citations omitted).

switching."[12] And the Commission "expect[s] to review a detailed implementation plan addressing, at a minimum, the BOC's schedule for intra- and inter-company testing . . . the current status of the switch request process."[13]

This and other language used in the Order leave no room to question the Commission's intention to create binding, substantive rules. See Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987) ("[M]andatory, definitive language is a powerful . . . potentially dispositive, factor suggesting . . . substantive rules"); see also Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988). The Commission's language clearly imposes prospective obligations on all BOCs in the form of binding norms.

Nor is there any doubt that the Commission intended to bind itself to particular positions by making such definitive pronouncements. The pronouncements thus are subject to APA rulemaking requirements. United States Telephone Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (in determining whether an agency statement is a substantive rule which requires notice and comment under the APA, the ultimate issue is the agency's intent to bind itself to a particular legal or policy position); see also Public Citizen, Inc. v. U.S. Nuclear Regulatory Commission, 940 F.2d 679, 681-82 (D.C. Cir. 1991). These requirements cannot be

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[12] Id. ¶ 319 (emphasis added). In addition, paragraph 137 provides that a BOC "is obligated to provide competing carriers with the specifications necessary . . . to modify or design their systems . . . to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access." BOCs "must provide competing carriers with all of the information necessary to format and process their electronic requests" and "must disclose to competing carriers any internal business rules." Finally, a BOC "must ensure that its . . . systems are designed to accommodate both current . . . and projected demand of competing carriers." Id. ¶ 137 (emphasis added).

[13] Id. ¶ 342.

mistaken for general, nonbinding policy statements. See Iowa Utilities Board, slip op. at 121 (holding that the substance of a decision, not the agency's characterization as "policy statement," determines suitability for review).[14/] It is hard to imagine any agency elaborating a pricing framework as specific and unequivocal as the Commission did in the Order (e.g., "prices . . . must be based on TELRIC principles") if it did not seek to use that framework to limit its discretion. See, e.g., American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

Since the Commission's adoption of the detailed requirements in the Order was not preceded by notice or opportunity for interested parties such as U S WEST to comment, the Commission should rescind each of these rules and state explicitly that the rules are in no way binding and will not be used as a basis for denying section 271 relief. If the Commission wishes to adopt rules for compliance with section 271, it should promptly commence an expedited rulemaking.

### C. The "Public Interest" Standard Does Not Create An Open Ended Right To Impose Unlimited New Conditions for Section 271 Approval.

Although the Commission declines to address the public interest showing made in Ameritech's application, it nevertheless specifies a laundry list of new factors it may consider in determining whether a BOC's entry into the long distance market will serve the public interest, as required by 47 U.S.C. § 271(d)(3)(C). The Order then states that these factors are "merely illustrative, and not exhaustive." Id. ¶ 398. And the Order makes sweeping pronouncements to the effect that the Commission will use the section 271 process as a catch-all enforcement tool to seek compliance with all of its other rules, even those not yet promulgated. See ¶ 374.

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[14/] The binding effect of the Commission's prescriptions is enhanced by the fact that BOCs may not supplement their section 271 applications after filing. See Order ¶¶ 49 & 50.

The effect of this approach is to make section 271 authorization an undefined, moving target. The Commission has discretion to apply the public interest standard in a reasoned, consistent manner, but not to hide the ball, and certainly not to add to the checklist. It may not use the standard to blur the location of the bar for section 271 approval, or to raise it continuously, by threatening to add new, unspecified conditions. Such a process turns the entire section 271 authorization scheme into a costly exercise in futility, compounded by the Commission's requirement that BOC applications be complete at the time of filing.

## II. THE ORDER UNLAWFULLY EXTENDS THE COMPETITIVE CHECKLIST.

The Order violates the statutory prohibition on extending the checklist by imposing excessive requirements concerning OSS and trunk blocking and by adding checklist terms under the guise of applying the public interest standard.

### A. The Order's Requirements Concerning OSS and Trunk Blocking Unlawfully Extend the Terms of the Competitive Checklist.

The Order extends the terms of the competitive checklist by imposing on future applicants substantive requirements in two areas: access to operations support systems ("OSS") and interconnection as measured by trunk blockage. In these areas, the Commission adopted detailed requirements that violate the express statutory prohibition against adding to the terms of the competitive checklist.

By extending the checklist, the Commission will exclude BOCs from the in-region interLATA marketplace on the basis of requirements far more strict than those contained in the checklist itself. This violates Congress's intent to "provide for a pro-competitive, de-regulatory national policy framework" designed to accelerate deployment of services "by

opening all telecommunications markets to competition." S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (emphasis added). As the Order itself recognizes, "additional competition in the long distance market is precisely what the 1996 Act contemplates," to be accomplished by permitting BOCs such entry once they have satisfied the condition of providing access and interconnection sufficient to allow local competition. Order ¶ 15.

The Act contemplates that, once BOCs have met this condition, they will be allowed to provide interLATA services on an overlapping basis with the growth of local competition. Congress did not intend to bar a BOC from entry until each and every local competitor is prepared to attest that it has perfect access to every function that the Commission views as conceivably related to the checklist and the BOC has confirmed this with data provided in accordance with newly devised Commission reporting requirements. Barring BOC interLATA entry on such a basis would stifle rather than foster the increased interLATA competition that the Act is designed to promote.

Consistent with the goal of overlapping expansion of local and long distance competition, the conferees indicated that compliance with the competitive checklist should be measured at the most general level, not through imposition of countless detailed mandates. The conference report emphasizes that whether a BOC "is providing access and interconnection" turns on whether a competitor has implemented an interconnection agreement and "is operational," and this determination should be key to the Commission's analysis under section 271(d)(2)(B). S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 148 (1996). Nowhere do the provisions of the statute or the statements of the conferees suggest that the Commission should implement the competitive checklist by devising additional requirements that involve

micromanaging an applicant's operations. To the contrary, Congress expressly declared that the Commission may not "by rule or otherwise, limit or extend the terms used in the competitive checklist." 47 U.S.C. § 271(d)(4).

The Order disregards the prohibition in section 271(d)(4) and extends the checklist by adding enormously detailed requirements with respect to OSS.[15/] Beyond these requirements, the Commission states that it will make an additional determination whether the applicant separately complies with its duty to provide nondiscriminatory access to each and every OSS function. Order ¶ 128. An applicant may be subject to even more than these numerous detailed requirements, which are not stated to be exclusive or dispositive. See id. ¶ 214 (Commission has a number of other concerns relating to OSS functions provided by Ameritech). This level of scrutiny holds an applicant to obligations that have no basis in the statute.

As the Commission itself has correctly recognized elsewhere, while BOCs must provide nondiscriminatory access to their existing operations support systems, they may do so in any way that allows competitors to provide service in "substantially the same time and manner" that the incumbent provides service to its own customers. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15763 (1996) ("Local Interconnection Order"). So long

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15/ See, e.g., Order ¶¶ 160 (deployed for combination of all network elements); 161 (prove either (a) actual commercial usage, or (b) a combination of carrier-to-carrier testing, independent third party testing, and internal testing; internal testing alone is not enough); 180 (no significant use of manual processing of orders); 212 (report extensive performance data); 219 (EDI).

as a BOC can demonstrate that it has processes in place that are reasonably designed to meet this standard, there is no rational reason to deny it interLATA entry.[16/]

U S WEST's position on OSS access is set forth in greater detail in its July 10, 1997 opposition to a Petition for Expedited Rulemaking To Establish Reporting Requirements and Performance and Technical Standards for OSS, RM-9101, filed by LCI International Telecom Corporation on May 30, 1997. There, U S WEST emphasized its commitment to equality in the provision of OSS access, while noting that it is both unrealistic (given the complexity of the task) and beyond the scope of the Act for the Commission to attempt to detail just how OSS access is to be provided. As U S WEST showed, it also would be beyond the scope of the Act to require U S WEST to construct OSS facilities and functions beyond what it already has in existence (a position ultimately vindicated by the Eighth Circuit). Moreover, evaluation of OSS access can best be conducted in the context of state arbitration proceedings -- and, despite the Commission's authority to define network elements, subject to the limits of the Act, it makes sense for the Commission to leave evaluation of interconnection agreements involving OSS access to state proceedings. This analysis is particularly apt in the context of the Commission's demonstrated willingness to override, in its decisions on section 271 applications, state negotiated or arbitrated decisions concerning OSS access.

The Commission also imposes performance and reporting requirements with respect to trunk blocking that are found nowhere in the Act. An applicant must be able to prove

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[16/] In addition, as we discuss below, the Commission's requirement that BOCs provide OSS support for the combination of UNEs by CLECs is inconsistent with the Eighth Circuit's holding that CLECs "will combine the unbundled elements themselves," and the

that the blocking rates on trunks that interconnect CLECs' networks with the applicant's network are the same as the blocking rates on the applicant's retail trunks. Order ¶ 224. Should the blocking rates for CLEC traffic be higher, the Commission may conclude that the applicant's interconnection facilities do not meet the same technical criteria and service standards that the applicant uses in its own network. Id. To satisfy section 271, the applicant must report data as dictated by the Commission, including comparative data on the number and percentage of CLEC/BOC calls blocked; the percentage of CLEC/BOC calls completed (as opposed to blocked and rerouted); and the extent to which calls are rerouted to NXXs of the CLEC or the BOC itself when they are blocked. Id. ¶ 255. In addition, if there are any signs of higher trunk blockage in the case of CLECs, the applicant must develop alternative routing solutions and provide CLECs with network call flow data, id. ¶ 253, thereby disclosing an unprecedented amount of proprietary network information.

These requirements cannot be reconciled with the Act. Section 271 conditions BOC entry into long distance on the provision of "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." Those sections look to the negotiation and agreement process to establish their content, and nothing in section 271 suggests that Congress intended the Commission to substitute its views for that process through the back door of conditioning entry into interLATA services. Nor does the nondiscrimination obligation of BOCs provide such a back door. As the Eighth Circuit has made clear, "[t]he fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to

every desire of every requesting carrier."[17] In fact, under the logic of the Order, a CLEC could block a BOC's market entry by underordering trunk capacity, thereby ensuring that its calls would be blocked.[18]

### B. The Public Interest Analysis in the Order Violates the Act's Bar Against Extending the Competitive Checklist.

The Order fails to give any meaning or effect to the Act's prohibition on extending the terms used in the competitive checklist. It enumerates a long, expressly nonexclusive list of factors the Commission "may" consider in assessing whether grant of any future section 271 application would serve the public interest, convenience, or necessity. The Commission's failure to cabin its public interest inquiry, and its enumeration of a number of public interest factors that are beyond the power of the Commission to impose violate the Act.

The Order argues that the Commission has "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest." Order ¶ 383; see id. ¶ 384. Based on that claimed authority, the Order imposes a requirement that an applicant demonstrate that it

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[17] Iowa Utilities Board, slip op. at 140 (striking down requirement to provide superior quality interconnection). The Order also contravenes the Act as interpreted by the Eighth Circuit in requiring BOCs to bear the risk of CLECs' failure to advise the BOCs of future significant increases in traffic. Order ¶ 242. As the Eighth Circuit has held, a CLEC that enters the industry through unbundled access must bear the risk of unpredictable traffic; it must acquire access to a BOC's network "without knowing whether consumer demand will be sufficient to cover such expenditures." Iowa Utilities Board, slip op. at 144. It is unreasonable for the Commission to shift the burden of accommodating unanticipated traffic to a BOC as a condition of interLATA entry.

[18] U S WEST does not suggest that ILECs are permitted to discriminate against interconnectors or to provide them with inferior service. U S WEST merely objects to the Order's adding to the checklist items that do not belong there and that, indeed, are harmful to the process.

"has undertaken all actions necessary to assure that its local telecommunication market is, and will remain, open to competition." Id. ¶ 386 (emphasis added). In other words "compliance with the checklist will not necessarily assure that all barriers to entry to local telecommunications market have been eliminated . . . . Consequently, we believe that we must consider whether conditions are such that the local market will remain open as part of our public interest analysis." Id. ¶ 390 (emphasis added).

Thus, the Order expressly relies on the public interest standard to add a substantial further requirement to those already enumerated in the checklist. The Order does not even seriously dispute that it is doing so. Rather, it asserts that, because the enumerated public interest "factors" are not "preconditions" to grant of a section 271 application, they do not extend the checklist. Id. ¶ 391. That is sophistry. The Commission has identified its public interest considerations in order to influence the BOCs' conduct and the contents of their applications: It has said it will consider compliance with these factors in deciding on how to rule on those applications and has, at the very least, expressly left open the possibility that it will deny applications for lack of compliance.

The cases cited by the Commission to establish its broad discretion to apply the public interest standard are not relevant here. See id. ¶¶ 383-84 and accompanying footnotes. None of those cases involved a public interest standard that, like section 271(d)(3)(C), is plainly limited by another statutory provision.

Indeed, the one category of issues that the Commission clearly cannot consider in exercising its responsibility to assess whether a grant of section 271 application is in the public interest is local competition. Section 271(d)(4) plainly removes that category in its entirety --

which is the subject of the competitive checklist -- from the ambit of permissible consideration under the public interest standard.

In any event, contrary to the position adopted in the Order, the public interest standard does not give the Commission discretion to consider a BOC's compliance with requirements that the Commission lacks authority to impose under sections 251 and 252 of the Act or the checklist. In the Order, the Commission asserts that, even if it lacks power to require a BOC to conform its interconnection pricing to the Commission's vacated TELRIC rules, it may consider whether a BOC has done so in assessing whether grant of the BOC's section 271 application is in the public interest. Id. ¶ 288. The Commission further says it will consider whether a BOC is allowing interconnecting carriers to pick and choose among the provisions of other interconnectors' agreements with the BOC. Id. ¶ 392.

Consideration of such factors plainly violates the Act. As to pick-and-choose, for example, the Order states that the Commission will look to whether the BOC "is making available . . . any individual interconnection arrangement, service, or network element provided under any interconnection agreement to any other requesting telecommunications carrier upon the same rates, terms, and conditions as those provided in the agreement." Id. ¶ 392 (emphasis added). By inserting the term "individual" in this requirement, the Order reintroduces precisely the claim of right to select among individual provisions of agreements that the Eighth Circuit invalidated. Nothing in the section 271 checklist authorizes the Commission to reimpose that requirement on BOCs (and BOCs alone) by making compliance with the rules a condition of entry. Nor does the public interest provision of section 271 give the Commission power to

consider, in deciding whether to grant a section 271 application, a BOC's compliance with standards or factors with which the Commission cannot lawfully require the BOC to comply.[19/]

## III. THE COMMISSION'S GUIDELINES FOR FUTURE APPLICATIONS ARE INCONSISTENT WITH THE ACT AS INTERPRETED BY THE EIGHTH CIRCUIT.

The Order imposes requirements that are inconsistent with the Act as interpreted by the Eighth Circuit in Iowa Utilities Board concerning the pricing of interconnection, shared transport, and combinations of unbundled network elements. As to pricing, the Order is so plainly inconsistent with the Eighth Circuit's decision that a number of parties to the Iowa Utilities Board case, including U S WEST, have petitioned the court to compel compliance with the court's judgment by ordering the Commission to refrain from arrogating to itself jurisdiction over pricing determinations that the court held belongs exclusively to the States.[20/] The lawfulness of the pricing provisions of the Order is thus before the Eighth Circuit for resolution, and U S WEST does not raise that issue here.

The Order's requirement that BOCs provide shared transport -- like the Commission's Third Order on Reconsideration adopted the same day[21/] -- also conflicts

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19/ See Motor Vehicle Mfr. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983) (arbitrary for agency to rely on factors which Congress did not intend it to consider).

20/ See Petition of State Commission Parties and NARUC for Issuance and Enforcement of the Mandate (filed Sept. 16, 1997); Petition for Immediate Issuance and Enforcement of the Mandate of Ameritech Corporation, Bell Atlantic Telephone Companies, BellSouth Corporation, SBC Communications Inc., U S WEST, Inc., and United States Telephone Association filed (Sept. 18, 1997), Iowa Utilities Board v. FCC, Nos. 96-3321 *et al.* (8th Cir.).

21/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Third Order on Reconsideration, FCC 97-295 (rel. Aug. 18, 1997) ("Shared Transport Order").

fundamentally with the Eighth Circuit's decision. According to the Order, a BOC must provide CLECs shared transport for all transmission facilities connecting the applicant's switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. Order ¶ 306. The Order also requires an applicant to prove that, when it provides a CLEC local switching as an unbundled network element, the CLEC receives access to all the features and functions of the switch, including the routing table resident in the BOC's switch. Id.

As U S WEST has set forth in its request for a stay of the Shared Transport Order pending judicial review, these shared transport rules violate the 1996 Act and cannot be reconciled with the Eighth Circuit decision.[22] Forcing incumbents to provide this finished service at cost-based prices by mislabeling it as an unbundled network eliminates the fundamental difference between the provision of unbundled network elements under section 251(c)(3) of the Act and the provision of finished services for resale under section 251(c)(4). Under the Act, the purchaser of unbundled elements must assume certain business risks and costs that the purchaser of finished services for resale does not bear.

As the Eighth Circuit explained, providing service through unbundled network elements is different from resale primarily because each method presents a different risk profile: Resellers avoid risk by matching supply with demand through the purchase of services "on a unit-by-unit basis." Iowa Utilities Board, slip op. at 144. The purchaser of a network element takes the risks associated with making "an up-front investment" in a capital asset; it does not

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[22] Request for Stay Pending Judicial Review, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (filed Sept. 9, 1997) ("U S WEST Stay Application").

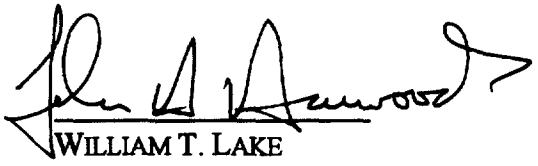
know whether consumer demand will be sufficient to cover that expenditure. Id. Indeed, this difference was the only reason the Eighth Circuit held that the Commission's liberal unbundling rules would not eliminate resale as a market entry strategy. See id.; see also Local Interconnection Order, 11 FCC Rcd at 15668. By following the Shared Transport Order, the Order here reaches the opposite conclusion, holding that new entrants must not be required to bear this risk. That conclusion violates the Act.

In addition, by requiring BOCs to provide shared transport and to combine network elements for CLECs, the Order violates the 1996 Act's mandate that "requesting carriers . . . combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). The Order obligates BOCs to do precisely what the Eighth Circuit said the Commission may not require -- to combine elements for CLECs. See Order ¶ 320. Thus, the Order specifies that a BOC's provision of OSS must support combinations of unbundled elements. Id. ¶¶ 159-60. In addition, the Order erroneously relies on the Eighth Circuit's failure to vacate 47 C.F.R. § 51.315(b) for the notion that BOCs must provide elements on a combined basis. Order ¶¶ 332-37. The Eighth Circuit's failure to vacate section 51.315(b) cannot override the Court's carefully explained and express holding -- on the very same subject -- that requesting carriers cannot force incumbent LECs to combine network elements for them. Iowa Utilities Board, slip op. at 143. In any event, section 51.315(b) does not support the provision of shared transport. The various interoffice trunks between an incumbent's end offices and tandem switches are not "currently combined"; rather, the particular elements needed for a particular call are combined when the call is set up and then uncombined when the call is completed. See U S WEST Stay Application at 15.

## CONCLUSION

For these reasons, U S WEST respectfully requests that the Commission reconsider the Order and grant the specific relief sought herein.

Respectfully submitted,



WILLIAM T. LAKE
JOHN H. HARWOOD II
JACQUELYNN RUFF
MICHAEL A. MCKENZIE
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

ROBERT B. MCKENNA
LAURIE J. BENNETT
U S WEST, INC.
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2861

*Counsel for U S WEST, Inc.*

*Of Counsel*:

Dan L. Poole

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